Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
04/28/2008 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2007-000437 04/25/2008

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
S. Brown
Deputy

SEMPRE LIMITED PARTNERSHIP JIM L WRIGHT

v.

MARICOPA COUNTY STEPHEN A WOLF

UNDER ADVISMENT RULING

(Maricopa County's Motion To Dismiss)

This case involves property that Plaintiff alleges to be agricultural. A.R.S. § 42-12153 provides that, in order for the county assessor to classify land as agricultural, or to prevail upon administrative appeal, the owner or agent must submit the appropriate agricultural use application form. Plaintiff apparently concedes that this form was not submitted; consequently, the assessor denied agricultural status, and his denial was upheld upon administrative review. Plaintiff asks the Court to reverse that denial on one or more of several grounds: that the recent amendment to A.R.S. § 42-12153, which permits appeal to the Tax Court notwithstanding failure to submit the form, applies retroactively; that A.R.S. § 42-16201 permits appeal to the Tax Court in all cases, overriding section 12153;and that it is entitled to rely on the County's allegedly a long-standing practice of allowing appeals in such cases regardless of the statute. Defendant urges that the Court lacks jurisdiction.

The County's motion asserts that the Court lacks jurisdiction on Plaintiff's claim, therefore there is no claim *on which the Court can grant relief.* The Court thus focuses on the jurisdictional issue. Technically, some of the necessary material is outside the pleadings. However, as this is a motion to dismiss for lack of subject matter jurisdiction, the Court may consider such evidence as is necessary to resolve the merits without converting the motion into one for summary judgment. *Seafirst Corp. v. Arizona Dept. of Revenue*, 172 Ariz. 54, 56 (Tax 1992). As mentioned, the single relevant factual issue, whether an agricultural use application

form was submitted, appears to have been conceded by Plaintiff. What remains is legal analysis of the consequences of its failure to submit that form.

This motion addresses an issue raised by the recent amendment to A.R.S. § 42-12153 allowing for direct appeal to the Tax Court in cases where agricultural status has been denied based on failure to submit the required agricultural use application form: is the amendment prospective in effect only, or may it be applied to afford relief for previous tax years? The amendment itself (which consists only of the words "or 5") is silent as to its retroactive effect. Normally, this would conclusively establish lack of retroactivity. A.R.S. § 1-244; *Garcia v. Browning*, 214 Ariz. 250, 252 ¶ 7 (2007). If the new statute does not apply retroactively, Plaintiff loses, because the denial was final and unappealable before it became law. Plaintiff points to a judicially-created exception to this general rule, that statutes which are purely procedural may be applied retroactively. *See, e.g., Pompa v. Superior Court*, 187 Ariz. 531 (App. 1997).

The analysis in *Pompa* is instructive. It examines the question within the framework of separation of powers: substantive rights are for the legislative branch to define, procedural matters for the judicial (though the legislature may enact procedural rules, subject to the power of the Supreme Court to override them). *Id*. at 533-34.

Appeal rights are substantive. While the appellate courts have never specifically considered whether the application form requirement is jurisdictional, filing deadlines specified by statute have repeatedly been found to be jurisdictional. "[T]itle 42 statutes contemplate that a taxpayer who objects to the classification or valuation of his property will appeal within the time limits set by those statutes. Generally, a taxpayer who fails to do so will have no remedy, even if he later discovers an error." *S&R Properties v. Maricopa County*, 178 Ariz. 491, 502 (App. 1993); *see also Arizona Dept. of Revenue v. Navopache Elec. Co-Op, Inc.*, 151 Ariz. 318, 323 (App. 1986); *Pesqueira v. Pima County Assessor*, 133 Ariz. 255, 257 (App. 1982). Significantly, the *S&R* court found a remedy to permit deviation from the statutory deadline, but in a statute (one not applicable here) conferring a substantive right, not in the constitutional power of the courts to promulgate their own procedural rules. 178 Ariz. at 502. The Court can discern no distinction in principle between a requirement that an appeal be filed by a certain date, which is substantive, and the requirement here that an application form be filed as a prerequisite both to obtaining agricultural status from the assessor and to preserving the right of appeal to the courts.

Waddell v. 38th St. Partnership, 173 Ariz. 137 (Tax 1992), relied upon by Plaintiff, is not on point. The issue in *Waddell* was when a *classification* statute applied to an action already properly before the court. Here, no one disputes that the law forbids the assessor to classify land as agricultural absent a properly submitted application form. The issue is rather whether the law permits the matter to be considered by the Tax Court at all.

Even if the analysis of the appellate courts is not squarely on point, and the Court can say no more than that the application requirement lies somewhere along the ill-surveyed frontier between substantive and procedural, there remains discretion for the Court to grant or deny the new law retroactive effect, for the higher courts have consistently used the permissive "may" rather than the peremptory "shall" to address whether to grant a statute retrospective application. *See, e.g., Aranda v. Industrial Comm'n*, 198 Ariz. 467, 470 ¶ 11 (2000); *In re Shane B.*, 198 Ariz. 85, 87 ¶ 8 (2000); *Allen v. Fisher*, 118 Ariz. 95, 96 (App. 1977). These decisions do not give clear instruction on when the new rule or the old is to be applied, but an important factor must be the degree to which it approaches substantiveness: the more similar the provision to other substantial provisions, the more hesitant the courts should be to supplant the established version. The Court finds further guidance in the law governing extensions of the statute of limitations to revive expired claims. Although the Arizona courts have never considered the question, other courts have generally held that, for an enlarged limitations period to apply to civil cases already time-barred, there must be an express statement from the legislature to that effect. *See, e.g., Maldonado v. Harris*, 370 F.3d 945, 955 (9th Cir. 2004) (interpreting California law). No such statement can be found in the statute or in its legislative history. The Court therefore concludes that the 2007 amendment to A.R.S. § 42-12153(B) permitting appeal to the courts notwithstanding failure to file a timely agricultural status application form applies prospectively only. It does not apply here.

Plaintiff's argument that the tax does not create a lien on the property until January 1 of the tax year is beside the point. The statutes provide a timetable to which a taxpayer must adhere. The point of *Territory v. Perrin*, 9 Ariz. 316 (Ariz.Terr. 1905), and Attorney General Opinion 64-15 is that, because the law does not provide for levying a tax on intermediate owners, the full amount of the tax must be borne by the owner (or not, if the owner is a public entity immune from taxation) as of the date the tax is fixed. Plaintiff is that owner.

A.R.S. § 42-16201 does not help Plaintiff. The specific statute prevails over the general. *Ruth Fisher Elementary School Dist. v. Buckeye Union High School Dist.*, 202 Ariz. 107, 112 (App. 2002). Here, Section 12153, prescribing the mechanism for appealing the assessor's decision in no-application-form cases, governs the appeal process in this case. The old version language that the owner "may" appeal through the administrative process does not imply that he may in the alternative appeal through any process. It merely indicates that the owner is not obligated to appeal: to say "the owner or agent *shall* appeal the classification" would suggest on the contrary that he was under a legal duty to appeal even if he did not wish to do so. Had the legislature wished to permit appeal of no-application-form cases through any of the statutory procedures – administrative process, Board of Equalization, or Tax Court – there would have been no reason to include that sentence at all. The legislative history supports this interpretation. The House summary of SB 1553, which became this statute, notes, "the option to appeal directly to court does not currently apply to the determination of whether a property qualifies for

agricultural classification," a situation which the proposed law was intended to change. That the County would not be prejudiced by an appeal outside the sole statutorily prescribed avenue is immaterial.

Plaintiff's argument with respect to A.R.S. § 42-13101 is based on a flawed premise. As Plaintiff acknowledges, only property qualifying as agricultural under A.R.S. § 42-12151 *et seq*. is valued according to the valuation formula in Section 13101. As Plaintiff's land does not qualify as agricultural under Section 12153, Section 13101 simply does not apply. That section cannot bootstrap itself into applicability by itself sufficing to classify land as agricultural.

The argument that the County has changed its position also fails. *City of Mesa v. Killingsworth*, 96 Ariz. 290, 296 (1964), holds that "while administrative interpretation is not binding[,] where long continued and in cases of ambiguity we will acquiesce therein." (Plaintiff does not establish the existence of an administrative interpretation of Section 12153 pursuant to which the County did not pursue this type of cases; a footnote suggests that discovery should be allowed, presumably to determine whether one exists, either in writing or *de facto*.) *Killingsworth* requires that the statute be ambiguous in order to hold the government to its interpretation: where the statutory language is clear, the court is bound by it.

Therefore, IT IS ORDERED Maricopa County's Motion to Dismiss is granted on the ground of lack of subject matter jurisdiction.